Supreme Court, U.S.
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No. 94-746

In The

Supreme Court of the United States

October Term, 1994

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ABRAHAM GUTIERREZ,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second District, Division Seven

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Respondent was convicted of attempted murder. Subsequent to his conviction the victim died. The District Attorney of Los Angeles, California, then filed a charge of murder in the second degree against the Respondent. The Petitioner now seeks to bar the Respondent by way of collateral estoppel, from litigating the issues of identity and malice.

The issue presented before this Court is whether collateral estoppel can be used by the Prosecution to obtain a jury instruction that, as a matter of law, some element of the crime charged has already been proved, without violating the Respondent's Sixth Amendment right to a jury trial, and his right to a fair trial pursuant to the Due Process Clause.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Abraham Gutierrez respectfully proposes that a writ of certiorari to review the judgment of the Court of Appeal for the State of California, Second Appellate District, Division Seven not be granted.

OPINION BELOW

The opinion of the Court of Appeal (Pet. App.) is reported as *Gutierrez v. Superior Court*, 24 Cal.App.4th 153, 29 Cal.Rptr.2d 376 (1994).

JURISDICTION

The Court issued an opinion granting Respondents petition for writ of prohibition on April 15, 1994, and denied a rehearing on May 10, 1994. The California Supreme Court, on August 11, 1994, denied the Petitioner's petition for review. Title 28, United States Code, section 1257 (a), confers jurisdiction on the Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Article III § 2

"The trial of all crimes, except in cases of impeachment, shall be by jury: . . . "

United States Constitution Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . "

United States Constitution Amendment XIV § 1

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

The Respondent has read and considered the statement of the case contained in the Petitioner's Petition For Writ of Certiorari, found at pages 3 through 9 and adopts the same haec verba.

REASON WHY WRIT SHOULD NOT ISSUE

(I)

THE DECISION BELOW WAS CORRECT

The Court of Appeal in holding that collateral estoppel cannot be used affirmatively by the prosecution rested its decision on two grounds. The first being that "[t]he assertion of collateral estoppel by the prosecution deprives petitioner of the right to present his defense to

the jury." (24 Cal.App.4th 169) Secondly, the Court questioned whether a murder trial, where the only issue presented to the jury was that of causation, and a jury so instructed in that manner, would not unduly prejudice the jury as to that issue. The Court stated, "This is so because a jury so instructed could not help but infer that the defendant had either admitted the other issues or another jury had already decided them against him. Either inference creates 'a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations.' (State v. Ingenito, supra, 432 A.2d 912, 918-919.)" (24 Cal.App.4th 170).

Collateral estoppel, although first developed in civil litigation, has been applied in criminal cases. *Ashe v. Swenson,* 397 U.S. 436, 443-444, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469, 475-475 (1970). However, the doctrine has been employed in criminal prosecutions primarily by formerly acquitted defendants; and, in that context, has been viewed as derivative of the Fifth Amendment's guarantee against double jeopardy for the same offense. *Ashe v. Swenson,* (supra), *United States v. Kramer,* 289 F.2d 909, 913 (2d Cir. 1961); *United States v. Richard,* 892 F.2d 761 (9th Cir. 1990); *United States v. Hernandez,* 572 F.2d 218, 220 (9th Cir. 1978). "The Use of Collateral Estoppel Against the Accused," 69 Colum. L.Rev. 515 (1969). The affirmative use of collateral estoppel against a defendant in a criminal prosecution is not predicated upon any constitutional mandate. Quite the opposite, the use of this evidentiary tool, would deny the Respondent his Due Process right "against conviction except upon proof

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 258, 264 (1970). This Court in *Carella v. California*, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) found that jury instructions that would relieve the state of its burden to prove every element of the charged offense violated the Due Process Clause. The Court "[S]uch directions subvert the presumption of innocence accorded to accused persons, and also invade the truth-finding task assigned solely to juries in criminal cases" (109 S.Ct. 2419, 2420).

Although this Court has not separately addressed the question whether a criminal defendant may be estopped from contesting an essential element of a charged offense, the direction that the Court has taken in other cases indicates that affirmative use of collateral estoppel by the prosecution would not be tolerated by the Court.

In *United States v. Dixon*, 509 U.S. ___, ___, n.15, 133 S.Ct. 2849, 2863-2864 n.14, 125 L.Ed.2d 556, 577, n.15 (1993), Justice Scalia, writing for four justices, observed that "Under *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 459 (1970), an acquittal in the first prosecution might well bar litigation of certain facts essential to a second one – though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time."

Aside from cases involving alienage, the majority of Federal courts have not allowed the doctrine of collateral estoppel to be used by the Prosecution. *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994); *United States v. DeAngelo*, 138 F.2d 466 (3d Cir. 1943); *United States v. Bruno*, 333

F. Supp. 470, 476 (E.D.Pa. 1971); *United States v. Carlisi*, 32 F. Supp. 479, 482 (1940) c.f.; *United States v. Colacurcio*, 514 F.2d 1 (9th Cir. 1975).

There have been federal cases that have been willing to allow the prosecution to use collateral estoppel affirmatively when the issue was one of status. One of those cases is *Hernandez-Uribe v. United States*, 515 F.2d 20 (8th Cir. 1975). In *Hernandez-Uribe* (supra) the defendant was convicted in the United States District Court for the Southern District of Iowa, of being an alien who, having previously been arrested and deported from the United States, unlawfully reentered the country. The Court of Appeal held that where the defendant had previously pled guilty to the same charge he was precluded by collateral estoppel from relitigating the issue of whether he was an alien. The court spoke of collateral estoppel in terms of establishing the defendant *status* as an alien stating:

> "The instruction given was based on the application of collateral estoppel to an alien in *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968). In that case the Ninth Circuit held that the Government could invoke the doctrine of collateral estoppel against the defendant and establish his alien status up to the date of the earlier conviction. The court adopted the reasoning of an earlier district court case, *United States v. Rangel-Perrez*, 179 F. Supp. 619 (S.D.Cal. 1959) when it said: [i]f the issue of alienage were to be tried each time a defendant makes an entry into the United States, after once having been found by judicial determination to be an alien, there would be less to deter future entries than at the present. Even though the present risk of

> prosecution for illegal entry would remain under 8 U.S.C. 22 § 1326, a defendant would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming and that such trial might, on one occasion, result in a favorable verdict and accomplishment of the objectives of the immigration laws to discourage and effectively control the already difficult problem of illegal entries into this country would be weakened". (515 F.2d. 21)

The underlying rationale justifying the application of collateral estoppel *Hernandez-Uribe v. United States,* (supra), *U.S. v. Rangel-Perez,* (supra) and the California case *People v. Majado,* 22 Cal.App.2d 323 (1937), appears to be the need to preserve judicial resources when an unchanging issue has been determined by a prior conviction. For instance, in *People v. Majado,* supra, the court characterized the crime as a "continuing one," which could result in "the expense of many trials before this . . . child reaches it majority, in each of which the fact of parentage must again be established," if collateral estoppel is not applied. Similarly, the *Rangel-Perez* Court reasoned that, if a defendant was not bound by an earlier determination of alienage, he or she "would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming and that such trial might, on one occasion, result in a favorable verdict" *Rangel-Perez,* supra at 626. The policy considerations that prompted the courts to allow the implication of collateral estoppel, as an offensive tool of the prosecution in the foregoing mentioned cases, is not present in the case at bar.

Cases involving alienage can be further distinguished from the case at bar. In the alienage cases, the conduct that led to the second or subsequent prosecution occurred after the judicial determination that was held to have barred relitigation. In this case, as in the cases of *People v. Goss,* 446 Mich. 5871 (1993); *United States v. Pelullo,* 14 F.3d 881 (3d Cir. 1994), the conduct preceded the judicial determination sought to be raised as a bar.

The majority of the states which have dealt collateral estoppel in criminal cases have held that it is not available to the prosecution. *People v. Coss,* 200 Mich.App.9, 503 N.W.2d 682 (1993); *State v. Ingenito,* 87 N.J. 204, 432 A.2d 912 (1981); *In re Susi et al.,* 38 Ohio App.2d 73, 313 N.E.2d 422 (1973); *State v. Johnson,* 594 A.2d 1288 (N.H. 1991); *State v. Stiefel,* 256 So. 581 (Fla. 1972).

The Court of Appeal found that use of collateral estoppel by the prosecution would deny the Respondent his right to a fair and impartial jury trial. The Respondent finds that Court's decision could be supported on grounds other than those stated in their opinion. If the Petitioner were allowed to include in the present trial, findings of fact stemming from his first trial for attempted murder, then his first trial would in effect have been transformed ipso facto into a trial for murder. Such a procedure would violate the Sixth Amendment guarantee given to an accused "to be informed of the nature and cause of the accusation".

The idea of having two different juries, each deciding a different portion of the elements of the crime charged, would be, in effect, a bifurcation of the trial. Although bifurcated trials are employed in various cases such as

prior convictions, penalty phase of a murder trial, or, in some instances, having two juries in multi-defendant cases, the bifurcation is always with the consent of the defendant. Of more importance is that the first portion of this bifurcated trial, which the Petitioner has proposed, would take place without the Respondent having been arraigned on the charge of murder. At the Respondent's trial for attempted murder, he was not informed that the evidence to be presented would, at some later date, be incorporated in a trial for murder. Notice of the specific charge against a defendant is a fundamental Constitutional right. Justice Black, delivering the opinion of the Court in *Cole v. State of Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), wrote:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made". (333 U.S. 201, 68 S.Ct. 517)

CONCLUSION

The decision of the State Court of Appeal was correct. A grant of certiorari would not serve any useful purpose, and therefore should be denied.

Respectfully submitted,

H. RUSSELL HALPERN
Attorney for the Respondent